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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
VS.
AMERICAN ELECTRIC POWER SERVICE CORP., et al.,
Respondents.

AMERICAN PAPER INSTITUTE INC.,
Petitioner,
VS.
AMERICAN ELECTRIC POWER SERVICE CORP., et al.,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
For the District of Columbia

BRIEF OF AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, INC. NATIONAL AUDUBON SOCIETY THE SOLAR LOBBY IN SUPPORT OF PETITIONERS

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This brief in support of petitioners is submitted with the written consent of counsel to all parties filed with the Clerk of Court.

INTEREST OF THE AMICI CURIAE

This brief is submitted by three national environmental organizations dedicated to protection of the environment, to prudent use and responsible management of natural resources, and to the economic, esthetic, and social advantages that flow from decreased dependence on nonrenewable sources of energy. These organizations have a combined membership of over 550,000 contributors. A more detailed description of each amicus appears in the Appendix to this brief.

Amici have an interest in this case because both section 210 of PURPA and the Federal Energy Regulatory Commission's implementing rules are important steps toward amici's goals of creating more equitable utility rate structures and reducing the nation's dependence upon nonrenewable energy sources. In particular, the rules challenged in this case promote the deployment of renewable energy technologies which are environmentally benign compared to the conventional electrical energy generators which they displace. The amici consider vindication of the FERC rules to be crucial to a sound energy future for the nation.

SUMMARY OF ARGUMENT

In order to tap the vast reservoir of electric power potentially available from wasted heat and renewable energy sources (denominated "qualifying facilities" or "QF's"),[1] Congress commanded the Federal Energy Regulatory Com-

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[1]This term, as used herein, means "qualifying small power production facilities" and "qualifying cogeneration facilities" as defined by section 201 of the Public Utilities Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 796 (17) (Supp. IV 1980) and under 18 C.F.R. §§ 292.201-292.207 (1980).

mission ("FERC") to establish an incentive purchase rate in section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA").

The full avoided cost rule operates only where markets do not. It is not a universal rule; it applies only in the absence of an agreement between a QF and a purchasing utility and only in the absence of a determination by a state regulatory commission that a lower rate provides a sufficient incentive.

The full avoided cost rule permits market mechanisms, where they exist, to establish prices for QF power. Where market forces are sufficient to make the full avoided cost tariff unnecessary, the states are free to prescribe another rate. Where the purchase of power from QF results in no cost advantage to the utility, it is not obliged to pay for the unneeded capacity. QF power elicited under the rule actually fosters competition with the purchasing utility that would not otherwise exist. The rule merely establishes an equitable bargaining framework under which negotiations between buyer and seller can proceed.

Nothing less than full avoided cost rates maximize cost-effective power production by QF's without raising electric rates. QF's can potentially provide the equivalent of twenty-five percent of current electrical consumption. Any lower purchase rates will retard development of these resources.

Full avoided cost rates are "just and reasonable to consumers" because they will moderate electricity prices. The resulting power from QF's will displace the most costly generators, induce utility cost reductions through competition, and reduce the costs of utility reserve margins through dispersed siting of QF's.

The rule also provides important benefits to the general public by substituting environmentally preferable power generation technologies and by decreasing the nation's reliance on foreign sources of oil.

The Court of Appeals erred in declining to accord substantial deference to the judgment of the expert agency on these points. Special deference was in order because the rule is a rate established by the agency under a novel congressional mandate and within strict limitations of time.

ARGUMENT

I

BACKGROUND

The full avoided cost rule is based on important principles of consumer equity and the public interest. This amicus brief is confined to that issue.

PURPA was a product of a widely-perceived national energy crisis.[2] The exigencies of the time were appreciated by this Court in upholding the constitutionality of PURPA last term in *FERC v. Mississippi*, ... U.S. ....., 102 S.Ct. 2126 (June 1, 1982):

> At the time [PURPA was enacted] it was said that the generation of electricity consumed more than 25% of all energy resources used in the United States. S. Rep. No. 95-442, p. 7 (1977). Approximately one-third of the electricity in this country was generated through use of oil and natural gas, and electricity generation was one of the fastest growing segments of the Nation's economy. S. Rep. No. 95-361, p. 32 (1977). In part because of their reliance on oil and gas, electricity utilities were plagued with increasing costs and decreasing efficiency in the use of their generating capacities; each of these factors had an adverse effect on rates to consumers and on the economy as a whole.

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[2]PURPA is one of five parts of a National Energy Act enacted by the Ninety-Fifth Congress as a top domestic priority of the Carter Administration. The cornerstone of the President's "National Energy Plan" was the maximum cost-effective conservation of energy in the economy, as reflected in the purposes of each of the five Energy Act components.

> S. Rep. No. 95-442, at 9. Congress accordingly determined that conservation by electricity utilities of oil and natural gas was essential to the success of any effort to lessen the country's dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had been experienced in 1977, and to control consumer costs.

Id. at 2130. The nation's energy supply picture has not brightened appreciably during the intervening years.[3]

In partial response, Congress enacted section 210 of PURPA to unlock the tremendous reservoir of untapped domestic energy that is potentially available from waste heat from industrial processes (cogeneration) and renewable energy sources.[4] Section 210 commanded the FERC to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including incentive rates governing the purchase of this power by electrical utilities. Section 210 and its legislative history prescribe four rate design parameters. The rates must:

1. Be just and reasonable to the electric consumers of the utility (§ 210(b)(1));

2. Be in the public interest (*Id.*);

3. Not discriminate against qualifying facilities (§ 210(b)(2)); and

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[3]*See* DOE, *Monthly Energy Review*, at 8, 27 (Sept. 1982); R. Stobaugh and D. Yergin, *Energy Future: Report of the Energy Project at the Harvard Business School* (Ballantine ed. 1980).

[4]*See FERC v. Mississippi, supra* at 2136, where this Court focussed specifically upon section 210:

> Congress also determined that the development of cogeneration and small power production facilities would conserve energy. The evidence before Congress showed the potential contribution of these sources of energy: it was estimated that if proper incentives were provided, industrial cogeneration alone could account for seven to ten percent of the Nation's electrical generating capacity by 1987. Sen. Rep. No. 95-442 at 21, 23.

4. Be predicated upon an examination of the costs of generation experienced by the utility rather than those of the qualifying facility.[5]

Within these parameters, the Congress left to the FERC the design of appropriate rates, subject only to the further limitation that the rate not "exceed the incremental

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[5]The fourth critical parameter is derived from the Conference Report which elaborates on the "just and reasonable" standard. It evinces a congressional intent that the rate governing purchases of power from QF's not burden the QF's with the type of detailed examination of the costs of generating power that is typically applied to regulated utilities. The Conferees explain that:

> It is not the intention of the conferees that cogenerators and small power producers become subject, by virtue of this language, and the rules promulgated under this section, to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power. The conferees recognize that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration of small power production enterprise is not guaranteed to be recoverable.
>
> The conferees wish to make clear that cogeneration is to be encouraged under this section and therefore the examination of the level of rates which should apply to the purchase by the utility of the cogenerators or small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. The establishment of utility-type regulation over them would act as a significant disincentive to firms interested in cogeneration and small power production.

H. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 97-98 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7831-7832.

cost to the electric utility of alternative electric energy." (§ 210(b)).[6]

No dispute exists that the full avoided cost formula provides an ample incentive to qualifying facilities and properly avoids subjecting them to utility-type regulatory scrutiny. The Court of Appeals vacated the rule because it was not satisfied that the standard was *just and reasonable* to electric consumers and in the *public interest.*[7] The essence of the court's reasoning was:

> By ordering that the purchase rate be equal to the full avoided cost *in every case,* FERC has, without convincing explanation, simply adopted as a *uniform rule* the maximum purchase rate specified in the statute. Congress made a clear distinction between a 'just and reasonable rate' and a rate based on the full avoided cost though the two *may* coincide. It has long been held that the essence of the just and reasonable standard is a *balancing of the interests* of the affected parties. Although FERC was *not* to subject cogenerators to complex, traditional utility-type regulation, it was compelled to consider the hard questions which the standard necessarily raises.

B-10 (footnotes omitted, emphasis added).

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[6]The "incremental cost of alternative electric energy" is defined to mean "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." (§ 210(d)). This "incremental cost" is equivalent to the "full avoided cost" in the FERC rule.

[7]All citations herein to the opinion and order of the Court of Appeals will be made to Petitioner's Appendix B. (*E.g.* B-1.) The court's opinion is reported at 675 F.2d 1226 (D.C. Cir. 1982). Citations to the Commission record which was before the Court of Appeals will be preceded by the letter "R".

The Court of Appeals acknowledged that "[t]he Commission may be right in its conclusion, but it needs to make its reasoning and findings explicit." B-11. Yet the court summarily dismissed the very "reasoning and findings" recited by the agency, not because they were without support in the record, but because of the court's factual and ideological prejudices concerning rate structure and utility economics.

On remand, the court asked the FERC to take competitive forces into account "in determining the degree and type of regulation necessary." B-15. This statement is astonishing because the full avoided cost rate does exactly that.

II

THE FULL AVOIDED COST RULE IS FLEXIBLE, OPERATING ONLY WHERE MARKET FORCES DO NOT

The Court of Appeals misread the full avoided cost rule in concluding that it is a "uniform rule" which applies "in every case." Indeed, it operates more as a guarantee, applying only in those cases where a state regulatory authority or self-regulating utility does not determine that some other rate is sufficient to encourage small power production.[8] Moreover, section 210 places *no* obligation on a utility to buy unusable capacity. Capacity payments are required

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[8]Rates at less than full avoided cost are authorized for purchases of electric energy "if the state regulatory authority . . . or the non-regulated electric utility determines that a lower rate is consistent with [the statutory criteria for establishing purchase rates], and is sufficient to encourage cogeneration and small power production." 18 C.F.R. § 292.304(b)(3) (1980) B-111. Other provisions permit state regulatory authorities or non-regulated electric utilities to apply for a waiver from *any* of the FERC rules under section 210 by showing that compliance is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA. *See* 18 C.F.R. § 292.403 (1980) B-118.

only when a utility "avoids costs" by virtue of the QF's capacity. The rules impose no requirement on the purchasing utility to deliver unusable energy or capacity to another utility for subsequent sale. *See* Section-By-Section Analysis accompanying 18 C.F.R. § 292.303 (1980), B-53.

In these respects, the FERC rule is more a guideline than a specific rate. Congress explicitly left a role for the states in defining and implementing the FERC rules, rejecting a more intrusive House bill. *See* 124 Cong. Rec. S17528 (daily ed. Oct. 7, 1978) (remarks of Sen. Jackson). The Conference Report refers repeatedly to action by "the Commission and the States." H. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 98, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7832. States were given substantial discretion to define and calculate avoided costs; the regulations refer to the need for "flexibility for experimentation and accommodation of special circumstances . . ." "Staff Discussion Paper," 44 Fed. Reg. 38863, 38865 (July 3, 1979). This discretion has in fact resulted in widespread variation in choices of methodology and, ultimately, in rates—variations much greater than would result from reducing avoided cost payments by five or ten percent. *See* Lock, *Statewide Purchase Rates Under Section 210 of PURPA*, 3 Solar L. Rep. 419 (1981).

Where the market pricing system is functioning to provide reasonable prices of QF's, the full avoided cost tariff becomes unnecessary and may be disregarded by the states. It must be noted, however, that section 210 was enacted in response to the perception that utilities were refusing to bargain reasonably with QF's for interconnection and the purchase of power; it is thus predicated upon a congressional assumption that market forces alone were not enough.

A. The Avoided Cost Rule Fosters Private Bargaining On Purchase Rates

The Court of Appeals overlooked the fact that full avoided cost rates do not *prevent* but in fact *facilitate* private transactions between the QF and the utility. Under 18 C.F.R. § 292.304 (1980), the full avoided cost rate is *elective;* the QF can either elect to receive payment based on the utility's avoided cost at the time of delivery *or* pursuant to an enforceable contract.[9] Section 292.301(b)(1) of the rule specifically contemplates that private bargaining will occur between qualifying facilities and electric utilities. The tariff merely establishes a framework within which bargaining can take place.

In fact, QF's have a strong incentive to negotiate agreements. Decentralized producers often lack the technical and administrative expertise that the utilities can furnish. Moreover, agreements that assure a long-term revenue flow are often indispensible to the QF in procuring financing. The avoided cost tariff guarantees a certain level of revenue for only a limited time, until the cost incidence of the utility changes. It is therefore in the interest of small

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[9]The effect of PURPA is simply to improve the bargaining position of QF's relative to the monopsony power of utilities. Section 210 shifts the burden of non-agreement from the QF to the utility, providing the QF a tariff rate to which it can resort if it believes the utility is not negotiating reasonably. *See* Lock, *Encouraging Decentralized Generation of Electricity: Implementation of the New Statutory Scheme,* 2 Solar L. Rep. 705, 717 (1980).

Small power producers testified in the rulemaking record that the monopsony power of the utilities and the lack of bargaining power possessed by developers discouraged small power production. R 2443, 2843-44, Vol. 1, 38Col. R 1186-87, 1523, Vol. 1, 186DC1, 219DC1. FERC expressly took this into account in the rules: "the ability of a qualifying cogeneration or small power producer to negotiate with an electric utility is buttressed by the existence of rights and protection of these rules." B-49.

power developers to trade away some percentage of the guaranteed tariff for a longer term commitment from the utility to purchase at an agreed rate.[10]

The full avoided cost rate provides a firm and reasonable starting point for these negotiations. Any lesser rate would simply erode the basis of the negotiations and produce a rate less optimal for QF development.

B. The Full Avoided Cost Rule Induces Competition in the Generation of Electricity

The full avoided cost rule not only allows market forces to function where they exist, it also *creates* a market which would not exist otherwise. Utilities traditionally have been the *sole* source of power for their customers. The full avoided cost rule changes this situation by encouraging alternative, private sources.

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[10]The FERC regulations explicitly recognize that the debt service obligations of qualifying facilities may require the latitude of contractual arrangements in lieu of tariff-like mechanisms.

> A facility which enters into a long-term contract to provide energy or capacity to a utility may wish to receive a greater percentage of the total purchase price during the beginning of the obligation. For example, a level payment schedule from the utility to the qualifying facility may be used to match more closely the structure of debt service of the facility. So long as the total payment over the duration of the contract term does not exceed the estimated avoided costs, nothing in these rules would prohibit a state regulatory authority or non-regulated electric utility from approving such an arrangement.

B-73.

In recent Senate hearings on section 210 of PURPA, Dr. Glenn J. Bjorklund, the Vice-President of Southern California Edison Company stated that his company has signed 60 contracts with QF's since the beginning of 1981, "nearly all of which have been negotiated at a rate below full avoided cost." *Public Utility Regulatory Policies Act Amendments: Hearings on Amendment No. 1452 to S. 1885 Before the Subcommittee on Energy Regulation of the Senate Comm. on Energy and Natural Resources*, Part 2, 97th Cong., 2d Sess. 110, 114, 131 (1982) (Statement of Dr. Glenn J. Bjorklund).

In effect, qualifying facilities compete with the purchasing utility itself as a source of power. To the extent that a utility can lower its own costs of generating power at the margin, it is obliged to pay qualifying facilities that much less under the "avoided cost" formula. If the utility can lower its marginal costs below a QF's costs of generating power, it can recapture that share of the marginal market for itself. If the purchase rate is established below the full avoided cost level, however, the utility is not subject to the same competitive pressure. The full avoided cost rule, in this way, unleashes the very market forces which the Court of Appeals feared were being fettered.

III

THE FULL AVOIDED COST RULE IS MANDATED BY THE OBLIGATION TO ENCOURAGE QF's WITHOUT SUBJECTING THEM TO PLENARY REGULATORY SCRUTINY

A. Full Avoided Costs Are Necessary for Optimal Deployment of QF's

With the rapid rise in electricity costs during the last decade,[11] the potential for cost-effective cogeneration in industry has become very large.[12] The potential for industrial cogeneration at existing plants exceeds twenty-five percent of electrical demand in the United States—equivalent to 93 large (1,000 MW) coal or nuclear power plants.[13]

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[11]Despite the slowdown in general inflation, electricity prices are still rising at an eleven percent annual rate. DOE, *Monthly Energy Review*, July 1982.

[12]This is particularly true in the petroleum, chemical, paper, food, and steel industries. *See* 3 DOE *Industrial Potential Cogeneration Source Book, Geographical/Industrial Sector Profile*, "Targeting Opportunities at the Plant Site (TOPS)" (1982).

[13]*See* Ross, *Energy Consumption by Industry*, 6 Ann. Rev. Energy 409 (1981).

The Department of Energy (DOE) projects the additional potential for cogeneration in *future* industrial facilities at 6, 11 and 14 percent of the total United States electricity consumption for the years 2000, 2010 and 2020 respectively.[13a]

The potential contribution of small-scale renewable energy systems is also impressive. Several forms, including hydropower, wind electric systems, and municipal waste combusters are now technically and economically mature. Several other technologies including generators using biomass fuels, photovoltaic cells, and solar thermal devices show great promise for the future.[14]

The amount of power from QF's that will be produced for external consumption at any time is directly a function of the price for which it can be sold to the connecting utility. As the price offered the QF is decreased from full avoided costs, the rate of return diminishes disproportionately, since the rate of return depends on the difference between revenue and cost.[15] Since the last few percentage

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[13a]*See* DOE, Energy Information Administration, *1981 Annual Report to Congress*, DOE/EIA-0173 (81)/3 at 174, 177 (1981).

[14]The Draft Environmental Impact Statement for the rulemaking process projects the following levels of small power production nationwide by 1995: Wind generation, 1900 MW; Municipal waste electricity generation, 360 MW, and Small scale hydropower generation, 3500 MW. FERC, *Draft Environmental Impact Statement*, "Rulemaking for Small Power Production and Cogeneration Facilities—Qualifying Status/Rates and Exemption," Docket No. RM-79-54, RM-55, at VII-12 (June 1980) ("DEIS").

[15]That full avoided cost rates provide the necessary investment certainly was made apparent to the FERC in the rulemaking proceedings. *See* R 1291, 2423, Vol. 1, 213 DC1, 57-58DC4. Potential investors and lenders are reluctant to commit funds unless a project demonstrates financial viability. (R 1311, 2882, Vol. 1, 86SF.) The more innovative the technology, the greater the risks to the developer. (R Vol. 1, 134Col.) If innovative projects are to be undertaken, some reward must be provided for the risk takers. (R 1309-11, Vol. 1, 181-82DC1, 185DC1. *See, e.g.*, Comments of the Hawaiian Sugar Planters Association, "the avoided costs' pricing standard . . . will constitute a necessary incentive for the production of

points of profit over operating costs will determine whether a facility is constructed and operated, a purchase rate below the utility's full avoided costs will discourage QF's that are only marginally profitable at the full avoided cost rate.

FERC's finding on this point was amply justified and clearly articulated:

> . . . in most instances, if part of the savings from cogeneration and small power production were allocated among the utilities' ratepayers, any rate reductions will be insignificant for any individual customer. On the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power producers, they may provide a significant incentive for a higher growth rate of these technologies.

B-65.

Any "savings" to ratepayers must come out of a QF's revenues at the margin, directly and profoundly affecting the rate of return on investment. For example, if FERC were to adopt a purchase rate at 80 percent of avoided costs (one of the alternatives suggested by the Court of Appeals), the rate of return on a cogenerator's investment would fall 40 percent for an 80 MW facility, according to a Department of Energy study.[16] This decrease in return on investment would cause an estimated reduction in cogeneration development of 50-70%, compared to the level anticipated under a purchase rate based on full avoided costs.[17]

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additional biomass power by Hawaiian sugar factories." (R 1334); testimony of the American Wind Energy Association, "payment of full avoided costs could be necessary to bring any significant amount of generation stock on line soon." (R Vol. 1, 134Col.)

[16]Resource Planning Associates, Inc., *The Potential for Cogeneration Development in Six Major Industries by 1985*, U.S. Department of Energy Contract No. CR-04-60172-00, December 1977 at Exhibit l.r.

[17]*Id.* at Exhibit l.j.

Thus, a relatively small adjustment in the price QF's receive produces disproportionately large changes in the deployment of such facilities. On the other hand, the savings experienced by the utility in purchasing QF power at less than full avoided cost must be spread among so many electrical consumers that it will become virtually undetectable.[18] And, because the benefits of QF power to ratepayers will be partially foregone, any savings to them in the short run will prove wholly illusory.[19]

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[18]The triviality of any saving to ratepayers can be illustrated by a simple hypothetical. Assume that the average price paid to QF's is 5¢/kWh, and that this reflects only 80% of the full avoided cost. Under the circumstances ratepayers would save 1.25¢/kWh. Assume FERC's estimate of 14×10^9 kWh purchased from QF's in 1985. *See* DEIS, *supra* note 14 at VII-17, Table VII-6. The total ratepayer savings nationwide of $175 million are approximately 0.2 percent of the 1980 electric utility revenues of $91.6 billion. (*Statistical Abstract of the United States*, 1981, Table 1018.) The total number of customers was 91.7 million in 1980. *(Id.)* Therefore the average savings per customer would be less than $2.00 per year. This estimated savings will result in a 50%-70% reduction in QF deployment. *See* text accompanying notes 16 and 17 *supra*.

[19]The Court of Appeals rejected FERC's reasoning on this point on the ground that "if cogeneration becomes substantial, a rate uniformly set at the statutory ceiling may be quite costly to consumers" (B-11) and that "a rate which is below full avoided cost, but still above the cogenerator's cost, could suffice to induce cogeneration. . . ." (B-14.) The court is so obviously wrong on these assertions that the agency could not be expected to provide elaborate demonstrations in anticipation of them. First, the court simply misread the rules in believing them to be uniform. (*See* note 8 *supra* and accompanying text.) Second, since avoided cost rates reflect the purchasing utility's cost savings in purchasing power from QF's they necessarily cannot cause costs to consumers to rise. Third, rates set at below full avoided costs will fail to induce QF's whose cost is above such rates to generate.

B. Alternatives Suggested By the Court of Appeals Entail Impermissible Regulatory Scrutiny

A unique merit of full avoided cost rates is that they eliminate entirely the need to scrutinize the QF's costs of generation because the full avoided costs is based wholly on the costs of the purchasing utility (which is already subject to regulation).

Congress viewed the prospect of utility-type regulation as a major disincentive to QF's. It therefore instructed the FERC to design an incentive rate which does not entail detailed examination of the QF's costs. Congress observed that, unlike electric utilities, qualifying facilities are not protected by a regulatory blanket from business risks and must therefore be assured a profit commensurate with those risks. *See* H. Conf. Rep. No. 1750, 95th Cong. 2d Sess. 97 (1978).

The Court of Appeals held that the FERC had correctly rejected a "split-the-savings approach" as excessively burdensome on QF's, but the court failed to recognize that a percentage of avoided cost approach suffers from the same problem.[20] The court apparently envisioned that FERC,

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[20]The Court of Appeals charged FERC on remand to

> allocate the benefits more evenly between the cogenerators and the utilities if the utilities can demonstrate that under a percentage of avoided cost approach, an allocation less heavily favoring the cogenerators is in the public interest and the interest of the utilities' electric consumers and will not disproportionately discourage cogeneration.

B-12. The utilities had the opportunity to make such a demonstration in the rulemaking proceeding. Instead they generally embraced the full avoided cost principle and contented themselves with urging technical and mechanical refinements:

> Con Edison and Boston Edison Company are particularly pleased that the final rules recognize that, although cogeneration and small power production is intended to be encouraged under Section 210 of PURPA, that encouragement is not to be provided at the expense of the other ratepayers of utilities, or

Solomon-style, would choose some percentage of avoided costs as the basis for a rate that allocates some of the cost savings to the utility and some to the QF. Whether the savings are to be split 50-50 (which the court correctly rejected) or according to some other ratio, the need to inquire into the qualifying facility's costs is inescapable. The percentage of full avoided costs that "appropriately" allocates the benefits cannot be determined without knowing how much it will cost to generate the alternative power. Only then can FERC calculate a sufficient profit margin or determine how much cogeneration and small power any given percentage of full avoided cost will induce.[21]

Under the court's rationale, FERC must not only scrutinize the mode and costs of operation of QF's, it apparently must do so separately for each technology and, perhaps, for each individual facility. This result follows from the fact that the costs of generation will vary widely among

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through the uneconomic encouragement of investment in unneeded generating. The final rules properly provided that utilities are not required to pay more than their avoided cost for purchases for qualifying facilities (§ 292.304(a)(2), 45 Fed. Reg. 12235) and that, where a utility has sufficient capacity to meet its demands, and purchases from qualifying facilities will not enable it to avoid any capacity costs, capacity credits for purchases from qualifying facilities are not required. (§ 292.304 (e)(3), 45 Fed. Reg. 12236).

Petition for Rehearing and Reconsideration on Behalf of Consolidated Edison Company of New York, Inc. and Boston Edison Company, p. 686 of the Joint Appendix and p. 3750 of the record.

[21]Likewise, the lower court's concern that FERC take into account differential pollution control standards and taxation rates between utilities and cogeneration invites just the sort of regulatory scrutiny which the Congress wanted to avoid. A thorough inquiry into the external benefits and disbenefits of small power production compared to conventional generation would lead to the conclusion that full avoided costs rates are overly *conservative* in view of the significant environmental and national security benefits of small power, as discussed at length *infra*. Such was the conclusion of the California Public Utilities Commision in its order implementing section 210 of PURPA. *See* note 22, *infra*.

technologies and facilities. A different percentage, therefore, would presumably be appropriate for each. Indeed, no approach other than a full avoided cost rate can be calculated wholly on the basis of the utilities' costs, without reference to the costs of the QF. Certainly the Court of Appeals was not successful in its efforts to suggest one.

IV

THE FULL AVOIDED COST RULE, BY MODERATING ELECTRIC RATES, IS JUST AND REASONABLE TO RATEPAYERS

In holding that the four parameters established for Congress for purchase rates require a "*balancing* of the interests of the affected parties," B-10, the lower court invoked an inapt metaphor which suggests that FERC should have refereed a compromise among the stakeholders—ratepayers, qualifying facilities and the general public—in order to strike a sort of equipoise. A more ideal view, however, is that PURPA envisions a rate which *optimizes* net benefits and provides maximum rewards to all stakeholders.[22] This optimization is *most* likely to be achieved by avoided cost rates.

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[22]Indeed, the California Public Utilities Commision in its Order implementing Section 210 of PURPA is strongly of the view that full avoided cost rates are the *minimum* necessary to effectuate the purpose of the law:

> Some argue that ratepayers are disadvantaged when avoided costs are paid to qualifying facilities, because in some cases these facilities can produce electricity at less than the avoided cost price. While it may be true that some QFs could be brought on line at a purchase price below avoided cost, such a price would not be sufficient to bring in other QFs capable of producing power at prices up to the avoided cost price. The point of permitting avoided cost pricing is to encourage the fullest possible efficient development of QF resources that can effectively and economically compete with utility resources. By opening this market, the supply of electricity is increased, which should lower customers' rates over time. Heavy utility reliance on oil and gas fuels to generate electricity has caused

A. The Full Avoided Cost Rate Induces Maximal Displacement of High Cost Electric Generation

Over the long run, avoided cost rates for alternative energy are likely to be more effective in reducing or moderating electrical rates than any lower rates. A utility seeks to minimize its costs of generating power by operating or building the most expensive plants last. Thus, the new power purchased from QF's will ordinarily displace the most costly source of generation or purchased power in the utility's supply mix. Least-cost dispatch assumes that the first energy source to be replaced by a QF is high-priced imported oil, just as PURPA intended. For utilities that are experiencing significant demand growth, the alternative power will eventually displace new power plants that would otherwise have to be built.[23] Such facilities are almost universally higher in cost than existing facilities.[24]

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rates in California to skyrocket. Avoided cost pricing is intended to stimulate development of substantial generating capacity that will reduce utility oil and gas consumption. In addition, system reliability is increased by the presence of larger numbers of smaller facilities.

If anything, this Commission believes that the avoided cost signal to QFs is a conservative one, as it does not include the tangible but hard to quantify "social costs" that are associated with new utility supplies and which are avoided through the purchase of QF power. These "social costs" include the risks associated with imported energy supplies and environmental degradation related to conventional generation.

Cal. P.U.C., Dec. No. 82-01-103, OIR2, at 25 (Jan. 21, 1982).

[23]In the unusual case where economics of scale cause the system-wide costs of generation to decline as new conventional capacity is added, the utility will not "avoid" capacity costs by purchasing QF power. In these cases, the full avoided cost rate will pay QF's only the value of the utility's fuel savings unless the utility chooses to wheel the power to another utility. A QF will have little incentive to locate in the service area of such a utility or to size the facility to generate power for external consumption. These cases are analogous to the overcapacity cases discussed at note 26 *infra* and accompanying text.

[24]New power plants require enormous outlays of capital which the utilities are finding increasingly difficult to raise. E Meyer,

To the extent that QF's substitute for expensive fuels and the construction of new power plants, the costs of generating power are reduced. Since these marginal sources define the utility's "avoided cost," a growth in the contribution of alternative energy will over time lower or moderate the avoided or marginal costs of providing electrical power, which should translate into lower rates for consumers.[25]

Admittedly, the situation is different for some utilities that already have more generating capacity than they need

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"New Directions for Utility Resource and Financial Planning," *Energy Efficiency and the Utilities*, California Public Utilities Commission Symposium Proceedings 139-144 (July, 1980). Because the lead time for new power plants can range as high as twelve years, the debt service on borrowed funds contributes substantially to the high cost of new capacity. Utilities which rely on projects with long lead times to meet anticipated future demand also incur the risk that the projects may prove unnecessary or obsolete. This occurred with the Washington Public Power Supply System. Declining forecasts of the need for power, coupled with cost overruns, forced the cancellation of two nuclear units on which $2.25 billion had already been spent. Nichols, *WPPSS—A Postscript*, Pub. Util. Fort. (June 24, 1982) at 54. Thus, the full avoided cost rate will result in an improvement in the financial condition of the utility because unnecessary capital investment can be avoided. Utilities have explicitly adopted the goal of minimizing capital expenditures to improve their financial status. *See* Pacific Gas and Electric Company, *Statement of Key Corporate Goals and Direction, Long Term Planning Results 1982-2000*, (June, 1982). Purchasing power under PURPA is an element of this strategy. The economic benefit to electricity consumers of lower cost of debt and equity is significant. *See* National Economic Research Associates, Inc., *An Economic Evaluation of the Marble Hill Nuclear Project*, Indiana Public Service Commission Cause No. 36818 at IV-17, 18 (October 4, 1982).

[25]The restraining effect on utility rates was apparently in mind as FERC developed the full avoided cost rule:

> Under the principles of economic dispatch, utilities generally turn on last and turn off first their generating units with

to meet demand in the present or near future. This situation gives rise to the theoretical problem which vexed the Court of Appeals:

> If a utility has excess capacity the additional cogeneration encouraged by full avoided cost payments will result in higher costs for all remaining customers of the utility because that cogeneration will reduce the number of customer-purchased kilowatt hours over which the utility can spread a share of the fixed costs of that extra capacity.

B-13. But this hypothetical misconstrues the application of the full avoided cost principle. If the avoided capacity costs on a system are small or nonexistent, so will be the incentive to QF's. Cogenerators, for instance, will either locate in a more conducive utility service area or size their facilities to serve only their own internal needs, rather than to sell power to the interconnecting utility because the incremental cost of additional generation will not be justified by the low rates predicated upon the utility's cost saving.[26]

B. The Full Avoided Cost Rate Induces Utility Cost Reductions Through More Efficient Use of Resources

We have noted above that the full avoided cost formula stimulates competition between utilities and QF's as to

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> the highest running cost. At any given time, an economically dispatched utility can avoid operating its highest-cost units as a result of making a purchase from a qualifying facility.
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> • • • •
>
> [Power from a QF can] permit the purchasing electric utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility, [and] the rates for such a purchase will be based on the avoided capacity and energy costs.

B-44.

[26] *See, e.g.*, Testimony of William A. Hawkins of Consolidated Edison Company of New York before the New York Public Service Commission in Case 27574 at 4 (1980).

the marginal supply of power. This competition exercises a restraint on utilities' resource expansion plans. The present and prospective availability of qualifying small power makes expensive new capital projects harder to justify without risking excess capacity.[27] This salutory competition, operating outside the usual regulatory constraints, will lead to more efficient use of resources by utilities and lower rates for consumers.

Small-scale dispersed generators also promote greater system reliability, decreasing a utility's need for reserves. The chances of an aggregate of 1,000 MW of small generators going off line unexpectedly are negligible compared to the chances of an unplanned outage of a single 1,000 MW central generating station. This decreased need for standby capacity translates into cost savings to a utility.[28]

All of these benefits to ratepayers—decreased cost of capacity additions, greater resource efficiency through competition, and decreased need for reserve capacity due to greater reliability—are directly correlated to the degree of penetration of cogeneration and small power production in the nation's electricity markets. Full avoided cost rates provide the maximum financial incentive for the construc-

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[27]Regulatory commissions have shown an increasing propensity to penalize utilities for unused capacity resulting from imprudent expansion decisions. *See, e.g.*, Iowa State Commerce Commission, *In re Iowa Illinois Gas and Electric Company*, RPLI-81-5, May 18, 1982; Ohio Public Utilities Commission, *Re Dayton Power and Light Co.*, Case No. 81-#L-AIR, 45 PUR 4th (Feb. 3, 1982); North Dakota Public Service Commission, *Re Otter Tail Power Co.*, Docket No. 10,124, 44 PUR 4th (July 20, 1981); Missouri Public Service Commission, *Re Kansas City Power and Light Co.*, Case No. ER-80-48, 38 PUR 4th (June 19, 1980).

[28]R. Deb and J. Mulvaney, "Economic and Engineering Factors Affecting Generating Unit Size," *IEEE Trans. on Power Apparatus and Systems*, V. PAS-101, No. 10 (October, 1982) 3907-3918. V. Loose and T. Flaim, "Economics of Scale and Reliability: The Economics of Large vs. Small Generating Units," 4 *Energy Systems and Policy*, Nos. 1 and 2 at 37-55 (1980).

tion and operation of such facilities without increasing costs to electrical consumers. Any lower rate, whether based upon a percentage of full avoided cost or some other formula, would discourage some substantial percentage of such facilities.[29]

V

THE FULL AVOIDED COST RULE IS IN THE PUBLIC INTEREST

The Court of Appeals was unconvinced that the full avoided cost rule meets the requirement that purchase rates be "in the public interest." (B-9.) To be non-redundant, this standard must comprehend public benefits beyond the rate benefits to particular customers. Many public interests may be affected by the emergence of alternative energy systems, but two benefits are particularly noteworthy because they were much on the minds of the members of Congress in enacting PURPA. These involve environmental quality and energy security.[30]

A. The Full Avoided Cost Rate Produces Important Environmental Benefits

The beneficial environmental impacts of cogeneration and small power production were discussed by the agency in the environmental impact statement on the proposed rules.[31] The impact statement found that "[o]ne of the major environmental benefits brought about by the operation of facilities induced by PURPA will be to reduce effects that otherwise would have occurred through con-

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[29] *See* note 18, *supra* and accompanying text.

[30] *See, e.g.*, H. Rep. No. 543, 95th Cong., 2d Sess. 5 (1978):

> The fundamental problem for the U.S. energy policy is the insecurity of its oil supply. . . . Our reliance on imported oil is expected to increase dramatically if present practices and policies are continued. . . . Such an increase in our reliance on oil imports would greatly constrain our foreign policy and could do considerable damage to our economy.

[31] DEIS, note 14 *supra*.

ventional utility power generation." DEIS at VI-30.[32] This statement projects that between 1980 and 1995, the full avoided cost rule will defer 5400 MW of coal-fired generation, 1200 MW of nuclear power, 3300 MW of oil and gas-fired generation, and 290 MW of large-scale hydropower. *Id.* at VI-18. Each of these generating technologies imposes substantial and controversial environmental costs at each step of its fuel cycle, from fuel extraction through combustion and waste disposal. The DEIS shows that for each new 1000 MW coal plant, 200,000-300,000 pounds per day of air pollution will be produced, depending upon the region in which it is located. *Id.* at VII-32, Table VII-13. Again, depending on the region, such a plant will produce between 1000 and 3700 tons of solid waste per day. *Id.* at VII-33, Table VII-4.

These substantial environmental costs detract from human health and quality of life. Small power production avoids or greatly reduces these costs[33] creating public benefits that militate strongly in favor of maximum stimulation of QF development.

B. The Full Avoided Cost Rate Enhances Energy Security

The other public benefit foremost in the minds of the Congress in enacting PURPA was the effect upon the

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[32]The advantages of cogeneration include the enhanced efficiency with which it uses fuel reserves compared to conventional generation. Cogeneration requires but one-half as much fuel to produce the same electricity as is required in a single purpose electricity generating station. R. Williams, *Industrial Cogeneration*, 3 Ann. Rev. Energy 313 (1978).

[33]To be sure, small power produces some untoward environmental effects as well. Cogenerators, for instance, cause a certain amount of air pollution. However, these effects were judged by the Commission to be sufficiently small compared to the important environmental benefits of small power to lead the Commission to conclude that "[t]he overall development of QFs will not have a significant effect on the quality of the human environment within the meaning of Section 102 of NEPA." DEIS at I-6.

nation's vulnerability to supply interruptions and price escalations from foreign sources of energy. As PURPA was being debated, the nation was importing 8.5 million barrels of oil per day—nearly half our needs—at fifteen times the price charged only a few years before, and domestic oil production was in decline.[34] The vulnerability associated with this external dependence can be measured by assessing the consequences to the national economy should the supply be preemptorily terminated. The Congressional Budget Office estimates that the loss of oil from one foreign supplier alone, Saudi Arabia, would cost the United States $272 billion, increase the unemployment rate by two percent, and boost the inflation rate by twenty percentage points.[35] The disruption of America's chief military allies would be even greater. This concern has given rise to open discussion of war to secure oil routes out of the Persian Gulf. President Carter called the situation "a clear and present danger to our national security."

While we do not maintain that PURPA, however vigorously implemented, can eliminate oil imports alone or immediately, the public benefit of enhanced energy security is furthered in direct proportion to the rate of deployment of qualifying facilities. The maximum financial incentive permitted under PURPA—full avoided cost—is the rate that best satisfies the "public interest" design parameter. This conclusion is too apparent to require extensive analysis in the decision-making record or explicit discussion in the Section-by-Section Analysis of the rules. It would be absurd to remand this case to the agency for it to state what no one can credibly dispute.

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[34]*See* Deese and Nye, *Energy and Security* 3 (Ballinger 1981).

[35]Congressional Budget Office, *The World Oil Market in the 1980's: Implications for the United States* (1980).

VI

THE FULL AVOIDED COST RULE, AS A RATE INNOVATION, WARRANTS GREATER THAN ORDINARY JUDICIAL DEFERENCE[36]

In a typical case of judicial review of agency rulemaking, a "thorough, probing, in-depth review" is proper under the instructions set forth by this Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).[37] In conducting such a review, the Court of Appeals failed to appreciate the unique features of this case. Judicial review of rate cases proceeds subject to a rule of special deference to the expert judgment of the decision-

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[36]Much debate has been joined in this litigation over the proper standard of review. *See* FERC Petition for Cert. at 22; American Paper Institute Petition for Cert. at 4, 16-20; Opposition to Petition for Cert. at 9-12. No real difference exists between the "substantial evidence" standard and the "arbitrary and capricious standard" in practice, especially in regard to informal rulemaking, as both the District of Columbia Circuit and the Second Circuit have recognized. *See American Public Gas Association v. Federal Power Commission*, 567 F.2d 1016, 1026-29 (D.C.Cir.) *cert. denied*, 435 U.S. 907 (1977); *Associated Industries of New York v. Dept. of Labor*, 487 F.2d 342, 348-350 (2d Cir. 1973).

[37]*Overton Park, supra*, established a three-part test. First, the court is "required to decide whether the Secretary acted within the scope of his authority." *Id.* at 415. Involved in this inquiry is "a determination of whether the Secretary's decision can reasonably be said to be within that range set forth by Congress." *Id.* Section 210 of PURPA established a range within which the rate for purchases of power is to be set, namely that it shall not "exceed the incremental cost to the electric utility of alternative energy." Clearly, the avoided cost rule does not *exceed* this point.

Secondly, a finding must be made that "the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 417. An examination of the over 4,000 pages of the record below amply illustrates that the decision was "based on relevant factors" and that "there has been [no] clear error of judgment." *Id.* The Court of Appeals could only conclude that the legislation *"could"* fail to induce additional cogeneration and *"might"* leave customers worse off. At the same time, the Court

making agency. This principle applies *a fortiori* where, as here, the rate is developed in response to a novel and experimental congressional mandate and subjected to tight and strict time constraints.

A. The Avoided Cost Rule is Valid Under the Special Deference Due Ratemaking

The instant case is steeped in the economics of rate-setting. This Court and many others have recognized that FERC's regulation of rates under the "just and reasonable" standard is due considerable deference. *See Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 806 (1973) (quoting *Manufacturers R. Co. v. United States,* 246 U.S. 457, 481 (1918) and *Board of Trade of Kansas City v. United States,* 314 U.S. 534, 546 (1942)). *See also San Antonio, Texas ex rel. City Public Service Board v. United States,* 631 F.2d 831, 836 (D.C. Cir. 1980).

Justice Douglas recognized the special status of ratemaking, from the standpoint of judicial review, in a case involving an order setting rates on coal:

> Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a dif-

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admitted that the Commission "*may* be right in its conclusion. . . ." B-38, B-11.

Third, "the final inquiry is whether the Secretary's action followed the necessary procedural requirements." Whether the proper procedures were followed is not at issue in this case which invalidated the avoided cost rule on substantive, not procedural, grounds.

> ferentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field.

Ayrshire Collierres Corp. v. United States, 335 U.S. 573, 592-93 (1949).

More recently, in *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), this Court had occasion to discuss in detail the scope of judicial review of rates set by the Federal Power Commission, the predecessor agency to the Federal Energy Regulatory Commission. The Court quoted the following passage from *Permian Basin* in *Mobil Oil Corp. v. FPC,* 417 U.S. 283, 307-308 (1974) as the "criteria governing the scope of judicial review":

> *The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.*

Id. at 283, quoting *Permian Basin, supra* at 791-92 (emphasis in original).

The rule set forth by this Court is that a reviewing court is "not obliged to examine each detail of the Commission's decision: if the 'total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.'" *Permian Basin, supra* at 767, quoting *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944). *See also Mobil Oil, supra* at 307. The Court has recognized that where Congress has invested an agency with general responsibility for administration of a complex regulatory scheme, the agency's interpretation of its statutory charter is entitled to special deference. *EPA v. National Crushed Stone,* 449 U.S. 64, 83 (1980).

It is clear on the face of the Court of Appeals' opinion that its real quarrel was not with the methods the Commission used but rather the "balance of interests" it struck. The above discussion illustrates that the Court of Appeals was simply mistaken on the facts and the record. Its contrary view was an improper substitution of its judgment for that of the Commission.

B. Judicial Deference is Also Appropriate Here in View of the Congressional Command for a Novel and Unprecedented Regulatory Initiative

FERC's decision warrants deference for another reason. PURPA marks a substantial departure from the traditional utility monopoly over generation of electricity. *See, e.g.*, 123 Cong. Rec. 23848 (daily ed. Aug. 1, 1977) (remarks of Sen. Percy); 123 Cong. Rec. at 32403 (Oct. 5, 1977) (remarks of Sen. Dunkin); *id.* at 32437, (remarks of Sen. Haskell); *id.* at 32419 (remarks of Sen. Hart). It calls for a fundamental reordering of the traditional regulatory scheme. Uniquely, it gives FERC authority over retail sales of power (from utilities to qualifying facilities as back-up power). Uniquely, it also gives states regulatory authority over sales for resale (power sales from QF's to utilities). Uniquely, it requires customers (utilities) to buy power from any QF. Incentive rates to encourage certain modes of power *consumption* are familiar, (*e.g.*, peak load pricing), but here FERC is required to prescribe rates which encourage certain types of *generation*. While the establishment of rates for electricity on the basis of the seller's cost is familiar regulatory terrain, Congress' desire to have rates based on a buyer's avoided costs is new ground.

Congress mandated these radical departures because of the substantial benefits of privately-financed cogeneration and small power producers. Yet, because of the pressing energy problems facing the country, Congress wanted the section 210 program implemented very quickly; FERC was given only twelve months to promulgate regulations. *See*

§ 210(a). Given the scope and complexity of the issues raised and the limited time in which to consider them, FERC could hardly be expected to make all its determinations with algebraic precision. *See Illinois v. Gorsuch*, 530 F.Supp. 340 (D.D.C. 1981) (Short time frame is evidence that "Congress did not expect the agency to resolve every conceivable problem.").

Courts have accorded an even greater degree of judicial deference, "[w]hen regulation features novelty, in subject, technique, or both," as another panel of the Court of Appeals for the District of Columbia stated in *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1031 (D.C. Cir.), *cert. denied*, 435 U.S. 907 (1977). *See also Shell Oil Co. v. FPC*, 520 F.2d 1061, 1071 (5th Cir. 1975), *cert. denied sub nom. California Co. v. FPC*, 426 U.S. 941 (1976) ("kid glove" review appropriate because of "experimental nature of regulation"); *Kennecott Copper v. EPA*, 462 F.2d 846 (D.C. Cir. 1972).

Because of the novelty of this exercise, history provides few guideposts. The amount of power that will be produced or withheld at any specific rate is a matter for educated conjecture. The effects on ratepayers of various levels of QF penetration is necessarily speculative.[38] Informed parties may earnestly disagree concerning the point of exact equilibrium among competing interests.

The FERC has emerged from this regulatory minefield with a formula which is logical, workable and within the range of options established by Congress. The full avoided cost role is the product of extensive and well-reasoned staff discussion papers, a formal environmental impact review, voluminous public comments garnered in two comment periods and 8 public hearings in 5 locales. All of this

[38]The FERC was aware that, because of the time constraint and because of the novelty of the program, the rules would of necessity be experimental and require review and revision as data from actual experience became available. *See, e.g.*, R 1249, 1312, 2477, 2786, Vol. 1, 146-47 DC4.

was accomplished within the tight time constraint of one year from enactment of PURPA, as required under section 210.[29]

Yet the Court of Appeals was not satisfied. In demanding absolute precision and quantification for the full avoided cost rule, the court applied a standard which no agency could hope to meet under comparable circumstances. Had the FERC adopted a "percentage of avoided cost" rule, the apparent preference of the Court of Appeals, it would manifest the same infirmities, as would any other formula. The only likely result of such a standard of review is regulatory paralysis and the practical demise of an important national energy program. PURPA is a novel and experimental program entrusted to FERC, and is thus entitled to more deference than a routine delegation of rulemaking power.

CONCLUSION

The order of the Court of Appeals for the District of Columbia should be reversed on the full avoided cost issue.

Respectfully submitted,

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(Appendix Follows)

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[29]Courts also recognize a special deference to agency decisions when they must be made within a short time frame. *See, e.g., E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1976); *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *Weyerhauser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

APPENDIX

DESCRIPTION OF AMICI

Natural Resources Defense Council, Inc., a national environmental organization with more than 44,000 members residing in all states and territories, as well as abroad, has as one of its principal goals the preservation and wise use of the natural resources of the earth, including those resources such as clean air and clean water held in common by all people. NRDC has sought, through the advocacy of effective federal, state and local laws, to assure that those commonly held resources are protected.

The National Audubon Society is one of the oldest, largest and most experienced national conservation organizations. It is devoted to conservation and protection of the natural environment which supports both humankind and wildlife. The National Audubon Society's 470,000 members in 425 chapters are backed by a full-time staff of 200 working in ten regional offices. The staff includes scientists and other professionals specialized in energy policy. In April, 1981, the Society published the Audubon Energy Plan in which cogeneration and small-scale power production are key elements in furthering the Society's purpose of promoting wise and efficient use of energy resources.

Solar Lobby is a not-for-profit organization with more than 40,000 members across the United States, in the U.S. territories, and in other countries. Solar Lobby's purpose is to take nationally focused political action to achieve the rapid, substantial, and widespread use of solar energy in an energy-efficient, environmentally sound, and equitable society. The staff of the Solar Lobby works nationally and through affiliate groups around the United States to ensure a rapid transition to a society based on renewable energy resources and energy efficiency with an emphasis on decentralized approaches to solving our energy needs. This organization envisions a society that obtains twenty-five percent of its total energy needs from renewable resources by the year 2000. Solar Lobby's national office is located in Washington, D.C. The organization's Media Project is located in Los Angeles, California.